

Florida Law Review

Volume 67 | Issue 4

Article 12

March 2016

Because, the Internet: The Limits of Online Campaign Finance Disclosure

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Recommended Citation

Vitaliy Kats, *Because, the Internet: The Limits of Online Campaign Finance Disclosure*, 67 Fla. L. Rev. 1513 (2016).

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BECAUSE, THE INTERNET: THE LIMITS OF ONLINE CAMPAIGN FINANCE DISCLOSURE

McCutcheon v. FEC, 134 S. Ct. 1434 (2014)

*Vitaliy Kats**

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INTRODUCTION

During the 2011–2012 election cycle, Shaun McCutcheon contributed \$33,088 to sixteen different candidates for federal office.¹ McCutcheon’s donations complied with the base limits the Federal Election Commission (FEC) set for contributions to individual candidates.² McCutcheon wanted to contribute more but was barred by the FEC’s aggregate limit on contributions.³ In June of 2012, McCutcheon and the Republican National Committee (RNC) filed a complaint before a three-judge panel of the U.S. District Court for the District of Columbia.⁴ McCutcheon and the RNC claimed that the aggregate limits on contributions to candidates and political committees were unconstitutional under the First Amendment.⁵ The three-judge panel granted the Government’s motion to

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1. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1443 (2014).

2. *Id.* The base limits were codified at 2 U.S.C. § 441a(a)(1)–(2) (2012) (to be recodified on Jan. 1, 2016 as 52 U.S.C. § 30116(a)(1)–(2)).

3. *McCutcheon*, 134 S. Ct. at 1443.

4. Verified Complaint for Declaratory and Injunctive Relief at 1, *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012) (No. 1:12-cv-01034-JEB-JRB-RLW); *McCutcheon*, 893 F. Supp. 2d 133, *rev’d and remanded*, 134 S. Ct. 1434 (2014).

5. *McCutcheon*, 893 F. Supp. at 135, 137. The limits prevent individuals from contributing more than \$37,500 in total to candidates and their authorized committees, and \$57,500 “in the case of any other contributions, of which not more than \$37,500 may be attributable to

dismiss, holding that the aggregate limits are constitutional because they prevent circumvention of the base limits.⁶ *McCutcheon* and the RNC then appealed directly to the Supreme Court under 28 U.S.C. § 1253.⁷ The Supreme Court reversed the lower court's decision and struck down the aggregate campaign contribution limits—established by the Federal Election Campaign Act of 1971 (FECA)⁸—on the grounds that the limits were an unnecessary burden on freedom of association under the First Amendment.⁹ The Court observed that the environment of campaign finance disclosure was far more transparent in the age of the Internet.¹⁰ The Court reasoned that the Internet allows access to an unprecedented level of information regarding campaign contributions and may actually render certain outdated campaign finance restrictions moot.¹¹

I. A BRIEF OVERVIEW OF DISCLOSURE IN CAMPAIGN FINANCE

Congress took its first major stab at comprehensive campaign finance reform in 1971 with FECA.¹² This Act restricted “the amount of money that candidates could personally contribute to their campaigns, limited what could be spent on media advertising, and required disclosure of

contributions to political committees which are not political committees of national political parties.” 2 U.S.C. § 441a(a)(3) (to be recodified on Jan. 1, 2016 as 52 U.S.C. § 30116(a)(3)).

6. *McCutcheon*, 893 F. Supp. at 140–42.

7. *McCutcheon*, 134 S. Ct. at 1444 (citing 28 U.S.C. § 1253).

8. 2 U.S.C. §§ 431–457 (to be recodified on Jan. 1, 2016 as 52 U.S.C. §§ 30101–30146). The specific provision containing the aggregate limits is 2 U.S.C. § 441a(a)(3).

9. *McCutcheon*, 134 S. Ct. at 1456, 1462.

10. Brief of Cause of Action Institute as Amicus Curiae Supporting Appellants at 11–12, 17, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536), 2013 WL 2102847 [hereinafter Cause of Action Brief]. The majority decision in *McCutcheon* cited this brief in support of its argument. 134 S. Ct. at 1460.

11. *McCutcheon*, 134 S. Ct. at 1460.

12. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–457). While FECA was arguably the first comprehensive federal campaign finance law, one of the very first federal campaign finance measures was the Publicity of Political Contributions Act of 1910, which called for limited disclosure of receipts and expenditures in elections for the U.S. House of Representatives. See Richard Briffault, *Campaign Finance Disclosure* 2.0, 9 ELECTION L.J. 273, 273 (2010). The first federal attempt at piecemeal campaign finance reform was the Tillman Act of 1907, 34 Stat. 864. But weak enforcement and a plethora of loopholes made the Tillman Act virtually worthless in stemming the tide of corporate money. See Francis Bingham, *Show Me the Money: Public Access and Accountability After Citizens United*, 52 B.C. L. REV. 1027, 1048 (2011). Congress attempted to remedy the weaknesses of the law by passing various statutes that predated FECA, none of which were comprehensive in their own right. See Jessica Furst, *Money and Politics: Will Expenditure Limits Take Candidates out of the Money Race and Put Them Back in the Office?*, 59 FLA. L. REV. 873, 881 (2007).

campaign contributions and expenditures.”¹³ Despite the seeming comprehensiveness of the initial restrictions, the Watergate scandal prompted another round of reforms very soon after FECA’s initial passage and resulted in the 1974 amendments to FECA.¹⁴ These amendments represent the origin of the contribution caps that would ultimately be at issue in *McCutcheon*.¹⁵

Almost immediately following the 1974 FECA amendments, disgruntled politicians challenged the contribution caps in the landmark case of *Buckley v. Valeo*.¹⁶ The politicians argued that limits on contributions and expenditures violated the First Amendment rights of candidates and their donors.¹⁷ Although the *Buckley* opinion addressed numerous facets of campaign finance law, the Court focused on the constitutionality of FECA disclosure requirements.¹⁸ The *Buckley* Court upheld these requirements, articulating numerous government interests in stopping corruption,¹⁹ but noted that disclosure, was “only a partial measure” and insufficient to prevent corruption.²⁰

Political parties were ultimately able to circumvent FECA by using “soft money” and “issue advocacy.”²¹ These twin concerns would lead to yet another round of amendments to FECA—the Bipartisan Campaign

13. Brandi Cherie Sablatura, *Reformation of 527 Organizations: Closing the Soft Money Loophole Created by the Bipartisan Campaign Reform Act of 2002*, 66 LA. L. REV. 809, 817 (2006).

14. FECA Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (amending FECA, 86 Stat. 3); Anthony Corrado, *The Promise of Campaign Finance Reform Has Largely Been Broken*, N.Y. TIMES (June 13, 2012), <http://www.nytimes.com/roomfordebate/2012/06/13/did-any-good-come-of-watergate/the-promise-of-campaign-reform-has-largely-been-broken>.

15. FECA Amendments § 101.

16. 424 U.S. 1 (1976).

17. *Id.* at 11.

18. *Id.* at 68.

19. *Id.* at 25, 66–67, 143. In its holding, the Court relied on the “conclusion that the requirement was narrowly tailored to . . . providing voters with information about candidates; deterring actual corruption and the appearance thereof by exposing large contributions and expenditures to the light of publicity; and facilitating government data-gathering necessary to detect violations of [FECA’s] contribution limits.” Lindsey Powell, *Getting Around Circumvention: A Proposal for Taking FECA Online*, 58 STAN. L. REV. 1499, 1530 (2006). Importantly, the Court described disclosure as “the least restrictive means of curbing the evils of campaign ignorance and corruption.” *Id.* at 1529 (emphasis added) (quoting *Buckley*, 424 U.S. at 68).

20. *Buckley*, 424 U.S. at 28.

21. *McConnell v. FEC*, 540 U.S. 93, 123, 126 (2003), *overruled in part by* *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010). Soft money is “money donated to the national parties to support state and local grassroots organizing or get out the vote efforts.” Daniel W. Butrymowicz, *Loophole.com: How the FEC’s Failure to Fully Regulate the Internet Undermines Campaign Finance Law*, 109 COLUM. L. REV. 1708, 1714 (2009). Issue advocacy refers to “ads attacking candidates for their position on a specific issue rather than advocating their defeat.” *Id.* at 1715.

Reform Act (BCRA).²² Like FECA, BCRA was an expansion of disclosure standards, extending FECA's disclosure requirements to corporations, labor unions, and individuals who fund "electioneering communications."²³ In 2003, the Supreme Court upheld this new ambit of regulations in *McConnell v. FEC*.²⁴ Seven years later, the Court adhered to its *McConnell* pronouncements in *Citizens United v. FEC*, where the appellant sought to advertise a documentary it made about Hillary Clinton in anticipation of the 2008 U.S. presidential election.²⁵ The appellant in *Citizens United* challenged both a disclosure provision that would require it to submit an identification statement to the FEC and a provision mandating disclaimers during advertisements.²⁶ The Court affirmed both requirements.²⁷ In the *Citizens United* majority opinion, Justice Anthony Kennedy wrote, "With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."²⁸ By the time *Citizens United* was decided in 2010, the Internet had become the primary platform for campaign finance disclosure in the United States.²⁹ The newfound accessibility of disclosure prompted the Cause of Action Institute to submit an amicus brief in *McCutcheon* that was dedicated to describing the changing technological climate:

[T]he development of free, on-line disclosure reports and cumulative databases puts previously-inaccessible information at the fingertips of even the least sophisticated analysts. For example, the FEC maintains a free on-line

22. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 12 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.). This law is known as "the McCain-Feingold Act" after its two sponsors, Senators John McCain and Russ Feingold. *McCain-Feingold Showdown*, N.Y. TIMES (Mar. 30, 2001), <http://www.nytimes.com/2001/03/30/opinion/mccain-feingold-showdown.html>.

23. *Id.* §§ 201–203. The BCRA defines an "electioneering communication" as a "broadcast, cable, or satellite communication" that mentions a candidate within sixty days of a general election or thirty days of a primary election. *Id.* § 201(3)(A).

24. 540 U.S. at 196, 201. Most interestingly, the Court seemed to recognize that a competing First Amendment right existed to counterbalance the desires of those who wished to contribute political money anonymously—"the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace." *Id.* at 197 (internal quotation marks omitted).

25. *Citizens United*, 130 S. Ct. at 887.

26. *Id.* at 913–14.

27. *Id.* at 914.

28. *Id.* at 916.

29. *Cf.* John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 625–26 (2005) ("Bruce Bimber and Richard Davis identify 2000 as the year when the Internet began to dramatically affect political campaigns.").

database of election contributions, often reported within hours of the contribution. The FEC makes available free data downloads for further data mining. The Department of Justice uses the FEC database as its primary research tool to uncover instances of campaign contribution abuse.³⁰

This is a far cry from how disclosure worked in the days when *Buckley* was decided. Prior to the advent of the Internet, disclosure reports were available only on paper.³¹ To obtain a disclosure report, one had to go to the Public Records Office of the FEC, which operated as a “store-front facility.”³² The first computer indices that would have been available when *Buckley* was decided were “primitive.”³³ The paper system meant that the millions of pages generated by the FEC’s reporting requirements only reached a small number of people.³⁴

II. *MCCUTCHEON* AND THE INCREASING POWER OF THE INTERNET

Chief Justice John Roberts’s majority opinion in *McCutcheon* went even further than Justice Kennedy’s in *Citizens United*, stating that “disclosure of contributions minimizes the potential for abuse of the campaign finance system.”³⁵ Justice Roberts dismissed *Buckley*’s characterization of disclosure requirements as “only a partial measure,” reasoning that the Internet now allows disclosure to be a much more potent tool against corruption than it had been when *Buckley* was decided.³⁶ The existing system of campaign finance disclosure—the FEC-operated online database that OpenSecrets.org and FollowTheMoney.org often accessed—“minimize[d] the potential for abuse of the campaign finance system.”³⁷ The contribution limits at issue in *McCutcheon* may have been harsh enough to encourage politicians to hide any money in excess of those limits.³⁸ Because of *McCutcheon*, the Internet is now offered as a self-sustaining legal argument in campaign finance litigation. The Internet’s existence is a standalone reason for the repeal of regulations developed at a time when the average person simply had no access to campaign finance information. It is, therefore, of paramount importance to address the limitations of what the Internet actually does for campaign finance disclosure.

30. Cause of Action Brief, *supra* note 10, at 18 (footnotes omitted).

31. See FED. ELECTION COMM’N, FIRST TEN YEARS REPORT 9 (1985), available at <http://fec.gov/pdf/firsttenyearsreport.pdf>.

32. *Id.*

33. *Id.*

34. Cause of Action Brief, *supra* note 10, at 15.

35. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014).

36. *Id.* at 1460.

37. *Id.* at 1459–60.

38. See *id.* at 1460–61.

III. THE LIMITS OF PURE DISCLOSURE

Justice Roberts's analysis of disclosure in *McCutcheon* is overly simplistic and potentially harmful to the future development of campaign finance laws. There are three problems that suggest the Court's view—that online disclosure of campaign finances will prevent corruption—must not be used as a standalone reason for striking down election laws.

The first problem with relying on internet disclosure is one of aggregation. Disclosing large amounts of data online presupposes that someone will actually examine that data. Unfortunately, the average voter is either uninterested or unwilling to do this legwork. The effectiveness of a campaign finance regime “relies on the willingness of intermediaries like the media or interest groups to examine the available information and present it to the public in a usable form before the election.”³⁹ In 2007, Professor Dick M. Carpenter II conducted a study on the effectiveness of disclosure in ballot issue elections.⁴⁰ Part of the study was a three-question survey designed to measure knowledge and use of disclosure information.⁴¹ According to Carpenter, “[l]ess than half of respondents reported being informed about laws governing contributions to issue campaigns,” and just over one-third of respondents actually “knew where to access lists of campaign contributors” or read these lists before casting their vote.⁴² This lack of knowledge, however, did not correlate at all with respondents' support for general campaign finance disclosure, suggesting that “citizens appear to know nothing about a law they strongly support and appear uninterested in accessing the information it produces.”⁴³

The most apparent reason for this inaction is the volume of information available.⁴⁴ Even candidates who run for minor positions have many contributors to report.⁴⁵ The cost of determining which donors

39. Briffault, *supra* note 12, at 288.

40. Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, INST. FOR JUSTICE 11 (2007), https://www.ij.org/images/pdf_folder/other_pubs/DisclosureCosts.pdf.

41. *Id.* at 11 tbl.2. The three questions, framed as propositions that respondents had to agree or disagree with, were:

1) I am informed about the laws governing contributions to ballot issue campaigns in the state; 2) I know where to access lists of those who contribute to ballot issue campaigns in my state; 3) Before I vote on ballot issues, I usually check out the list of contributors to the respective campaigns.

Id.

42. *Id.*

43. *Id.* at 11, 20 n.39.

44. Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255, 266 (2010).

45. *Id.*

on a massive list are likely to create corruption is too high for the average voter.⁴⁶

Individual voters' reluctance to sift through the disclosure information is compounded by intermediaries who will do the work for them. In the age of paper disclosure reports, voters often relied on journalists to attain and process the information.⁴⁷ The modern age is no different in that respect, with journalists, traditional news networks, and online pundits sifting through the FEC's online database.⁴⁸ Professor Richard Briffault notes that "[t]he real benefit from disclosure may be public education generally rather than voter information specifically. When collected and analyzed by reporters, bloggers, scholars, good government organizations, and competing interest groups . . . disclosure reports can help provide a vital primer on the influence of money in law. . . ."⁴⁹

If, however, the true benefit of online disclosure is having campaign disclosure data disseminated by third parties, then some degree of bias in that data's presentation seems unavoidable. For example, the good-government organizations responsible for a great deal of the disclosure of "money in politics" also have their own agenda—promoting generally stricter campaign regulations.⁵⁰ Traditional media abounds with examples of poor presentation of campaign finance information. The work of Professor Stephen Ansolabehere, Erik C. Snowberg, and Professor James M. Snyder Jr. suggests that voters already have a skewed perception of campaign finance that correlates with media coverage.⁵¹ Ansolabehere, Snowberg, and Snyder compared newspaper coverage of expenditures and contributions with the actual contribution and expenditure figures.⁵² Their results suggest that newspapers were not presenting accurate information.⁵³ The study also noted that: "Expenditures reported in the papers are approximately three to five times larger than the reality. The amounts spent on television advertising are

46. Justin M. Sadowsky, *The Transparency Myth: A Conceptual Approach to Corruption and the Impact of Mandatory Disclosure Laws*, 4 CONN. PUB. INT. L.J. 308, 332 (2005).

47. See, e.g., Wayne Barrett, *City for Sale: Ed Koch and the Betrayal of New York*, THE NATION INST. (Jan. 30, 2015), http://www.nationinstitute.org/featuredwork/books/1287/city_for_sale:_ed_koch_and_the_betrayal_of_new_york/.

48. See Mayer, *supra* note 44, at 267 ("MSNBC sifted through federal contributor data to identify journalists who had made federal political contributions, often in apparent violation of their employers' stated policies.").

49. Briffault, *supra* note 12, at 299.

50. Robert F. Bauer, *Not Just a Private Matter: The Purposes of Disclosure in an Expanded Regulatory System*, 6 ELECTION L.J. 38, 52–53 (2007).

51. Stephen Ansolabehere, Erik C. Snowberg & James M. Snyder Jr., *Unrepresentative Information: The Case of Newspaper Reporting on Campaign Finance*, 69 PUB. OP. Q. 213 (2005).

52. *Id.* at 227.

53. *Id.*

much smaller than reported. And congressional challengers spend much, much less than is presented in the press.”⁵⁴ Political blogs that use campaign finance information are often nakedly biased in their political leanings.⁵⁵ If these blogs were to act as middlemen between the public and the FEC, then they might frame the campaign finance information to suit their ideology.

The second problem with using internet disclosure as a standalone reason for striking down campaign finance regulations is that disclosure does not actually empower voters to do anything. A voter has no recourse to take action against an unsavory organization donating to a political candidate. Unlike the FEC, a voter has no power to impose sanctions on a candidate for corruption.⁵⁶ One vote hardly has the stopping power of the contribution ceilings at issue in *McCutcheon*.⁵⁷ Consequently, even when a voter has knowledge of potentially illegal donations, there is little a single voter can do about it. The problem becomes acute when considering “bet hedging.”⁵⁸ A donor might give money to sources in multiple parties, to multiple candidates within the same party, or to competing candidates in the same election cycle.⁵⁹ In such a situation, the voter is stripped of any genuine power. Apart from hedging, campaign finance may not be as important to voters as other issues. If a candidate

54. *Id.* at 219. The researchers’ findings on contributions were equally troubling. Ansolabehere and his coauthors asked 1200 adults to estimate the sources and amounts of House of Representatives campaign funds. *Id.* at 225. Respondents believed that interest groups contributed fifty percent more money than individuals, but in fact individual contributions account for more than half of all reported contributions to House and Senate races. *Id.* at 226. Perhaps the most telling part of the research is that the margins of the respondents’ overestimations were equivalent to the overestimations in the newspapers. *Id.* at 225.

55. There are far too many examples to list of political blogs that either openly market themselves as favoring one side of the political spectrum or have authors with well-known political leanings. *See, e.g.*, DAILY KOS, <http://www.dailykos.com/> (last visited July 1, 2015); GATEWAY PUNDIT, <http://www.thegatewaypundit.com/> (last visited July 1, 2015); HOTAIR, <http://www.hotair.com/> (last visited July 1, 2015); VOLOKH CONSPIRACY, <http://www.washingtonpost.com/news/volokh-conspiracy/> (last visited July 1, 2015); THINKPROGRESS, <http://thinkprogress.org/> (last visited July 1, 2015).

56. Briffault, *supra* note 12, at 288–89.

57. *Id.*; *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014).

58. Jason Cohen, *The Same Side of Two Coins: The Peculiar Phenomenon of Bet-Hedging in Campaign Finance*, 26 N. ILL. U. L. REV. 271, 275 (2006) (discussing the practice of donors contributing to competing parties or candidates so that the donor enjoys some benefit regardless of who wins the election).

59. *Id.* at 274. There are many somewhat speculative reasons as to why donors hedge their bets in elections. The most cynical rationale would be ex-post favor seeking—a donor believing that each candidate in a race is able and willing to give him some kind of political favor. *Id.* at 306. A donor could also donate to multiple candidates to express neutrality or to promote democracy. *Id.* at 307. But for this Comment’s purposes, the result is the same.

is funded by suspect donors but takes a favorable social stance, then voters may still vote for that candidate, despite the perceived corruption.⁶⁰

The final problem with internet disclosure as a standalone reason for striking down campaign finance regulations is that disclosure may discourage participation, particularly donations to an unpopular cause. As a result, political money may avoid the spotlight and rely on backchannels rather than traditional avenues. In this way, too much disclosure may actually decrease transparency. The Supreme Court acknowledged the idea that disclosure decreases participation in *NAACP v. Alabama*.⁶¹ In that case, there was significant evidence that membership in the NAACP led to retaliation against the members.⁶² Thus, the Court found that compulsory disclosure of the NAACP's members infringed on the members' freedom of association.⁶³ The *Buckley* Court acknowledged that disclosure has a chilling effect on political participation, at least in terms of disclosure requirements for minor parties and independents.⁶⁴

A clear example of the way disclosure may chill political participation is the Proposition 8 ballot initiative in California.⁶⁵ Because of Proposition 8's unpopularity, supporters of the measure became targets for death threats.⁶⁶ "[A]version to public exposure particularly deters

60. Briffault explained this dilemma by using an example from the Clinton/Dole election of 1996: "[Voters] could not vote for Dole on campaign finance, or on character, and for Clinton on economic policy or health care reform, but rather had to combine all their conflicting concerns The vote is simply too blunt an instrument" Briffault, *supra* note 12, at 289.

61. 357 U.S. 449 (1958).

62. *Id.* at 462.

63. *Id.*

64. *Buckley v. Valeo*, 424 U.S. 1, 71–72 (1976). In fact, the Court respected the threat of chilling to such a degree that the standard for disclosure exemption is reasonableness. *Id.* at 74. For an example of the Court applying reasonableness in this context, see *Brown v. Socialist Workers '74 Campaign Comm.* (Ohio), 459 U.S. 87 (1982) (holding that disclosure requirements applied to a minor party would subject the members to a serious threat of retaliation). Concededly, the Supreme Court has upheld contribution limits over the First Amendment interest in anonymity before. See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 914–16 (2010); *McConnell v. FEC*, 540 U.S. 93, 194–202 (2003); *Buckley*, 424 U.S. at 60–74. However, the laxity of the standard is, if nothing else, an indicator that chilling must be considered.

65. Proposition 8 was a 2008 ballot measure that banned gay marriage in California through amendment of the state's constitution. Petitioners' Brief at 2, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (No. 09-559), 2010 WL 711186. The measure immediately set off a firestorm in California, a comparatively liberal state. Eric McGhee & Daniel Krimm, *California's Political Geography*, PUB. POLICY INST. OF CAL. (Feb. 2012), http://www.ppic.org/main/publication_quick.asp?i=1007. Pursuant to California law at the time, the names and zip codes of all donors to the initiative were posted online and made publically accessible. CAL. CODE REGS. tit. 2, § 18550 (2006).

66. See Andres Araiza, *Prop 8 Threat: Fresno Police Close to Arrest*, ABC-30 (Oct. 31, 2008, 12:00 AM), <http://abc30.com/archive/6479879/> (discussing a death threat directed at the Fresno mayor for his support of Proposition 8). A federal court did eventually hold that the number

persons from associating themselves with causes that are unpopular or unconventional.”⁶⁷ Naturally, disclosure may divert some stereotypically large and “corrupt” contributors, but most donations to U.S. House and Senate races are small.⁶⁸ And large donors can simply bet on both candidates to hedge and mitigate any backlash, whereas a smaller donor may not be able to afford two donations to two candidates. Thus, the chilling effect of disclosure mostly hurts small donors with unorthodox views. The outcome will likely be disengagement from the contribution process or increased use of backchannels.⁶⁹ Pushing donors to give their money to organizations with no reporting requirements runs counter to the purpose of disclosure.

CONCLUSION

Disclosure was once considered a limited means of deterrence at best. The average voter was unable to access paper campaign disclosure reports due to technological constraints. Today, voters have the opposite problem. Voters have more information than they know (or care to know) what to do with. Despite these limitations, the brave new world of technologically-empowered campaign finance is now being used as an independent and sufficient reason to strike down campaign finance laws. If the Court is to put forward technological process as grounds for reforming antiquated laws, then, at the very least, it must acknowledge the limitations of mere disclosure as a deterrent to corruption.

of violent acts against the Proposition 8 supporters were small in comparison to those acts that were constitutionally protected—boycotts and protests. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1216 (E.D. Cal. 2009). However, this illustration still represents a concrete example of how disclosure can be used against donors.

67. William McGeeveran, *Mrs. McIntyre’s Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1, 22 (2003).

68. Professor William McGeeveran echoes this point: “[T]he corruption interest, like the information interest, fails to justify disclosure of modest-sized contributions. Most donors are small fry. Their negligible influence poses little danger of corruption, however defined.” *Id.* at 30 (footnote omitted).

69. An example of this is the 501(c)(4), an organization used in recent years to avoid disclosure of political donations. Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the “Dark Money” Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL’Y 383, 463 (2013) (“The importance of avoiding disclosure was key to the decision by many groups to opt for the 501(c)(4) form.”).